FILED
JUL 12 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 233

311
23

JAMES B. BERRY SONS' COMPANY, INC.,
Petitioner,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY,
a corporation, Lessee of Michigan Central Railroad,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

JOHN L. NESBIT,
Franklin, Pa.,

J. VILLARD FRAMPTON,
J. H. COURTNEY,
Oil City, Pa.,

Counsel for Petitioner.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

PAGE

Petition: 1

A. Question Presented 1

B. Summary Statement of the Matter Involved .. 3

C. Reasons Relied on for the Allowance of the Writ 6

Brief: 9

I. Opinion of the Court Below 9

II. Jurisdiction 9

1. Statutory provisions believed to sustain jurisdiction 9

2. Statute of United States which is involved 9

III. Statement of the Case 10

IV. Specification of Errors 10

V. Summary of Argument 11

VI. Argument 11

1. The issue in the case at bar called for the application of the law, Sec. 3, par. (1) and par. (2) of the Interstate Commerce Act, and Order *Ex Parte* No. 73 of the Interstate Commerce Commission, issued pursuant thereto, to govern carriers by railroad when making delivery of freight at destination upon credit in lieu of payment of accrued tariff charges as a prerequisite to delivery 12

2. The judgment entered on the verdict rendered by the jury upon this issue in favor of the petitioner was warranted and was erroneously reversed, on the theory that the petitioner, as shipper, was liable because it had not invoked the benefits of the stipulation under Section 7 of the bill

122635

PAGE

of lading, despite the extension of credit to consignee by respondent contrary to the law prescribed to govern the shipments 15

Appendix 19

TABLE OF CASES.

Cases:

A. C. L. R. Co. v. Riverside Mills, 219 U. S. 186 14
B. & O. R. Co. v. Domestic Hardwoods, 65 F. (2d) 488 14
Cudhay Packing Co. v. Bixby, 205 S. W. 865, 248 U. S. 577 14
Freedman v. Erie R. R. Co., 246 Ill. App. 479 14
Great No. Ry. Co. v. Sullivan, 294 U. S. 458 14
Lewis Poultry v. N. Y. C. R. Co., 105 A. 109 14
L. & N. R. R. Co. v. Central Iron & Coal Co., 265 U. S. 59 16
M. K. & T. R. Co. v. Ward, 244 U. S. 383 14
Richardson & Sons v. The Burlington, 1931 Can. S. C. R. 76 .....14, 1[illegible]
Suzuki v. Cent. Argentino Ry., 27 F. (2d) 795 14
T. & P. Rwy. Co. v. Leatherwoods, 250 U. S. 479 14

Appendix:

Re: Order *Ex Parte* No. 73, 171 I. C. C. 268 19

Statutes:

Interstate Commerce Act:
Sec. 3, par. (1) 9, 10, 11, 12, 17
Sec. 3, par. (2) 2, 5, 6, 9, 10, 11, 12, 17
Sec. 20, par. (11) 13
Judicial Code, Sec. 237b 9
Order *Ex Parte* No. 73.....2, 3, 4, 5, 6, 9, 10, 11, 12 13, 14, 15, 16, 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

JAMES B. BERRY SONS' COMPANY, INC.,
Petitioner,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY,
a corporation, Lessee of Michigan Central Railroad,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of James B. Berry Sons' Company, Inc., a corporation of Pennsylvania, respectfully represents:

A. Question Presented.

The essential question is whether a carrier by railroad delivering freight consigned for interstate transportation upon a uniform domestic through bill of lading, issued by another carrier by railroad, may deliver freight so trans-

ported and relinquish possession thereof at destination to the consignee upon an extension of credit for the accrued charges thereon contrary to and in violation of the law as declared in Sec. 3, par. (2) of the Interstate Commerce Act (49 U. S. C. A. 3 (2)), and the rule of the Interstate Commerce Commission known as Order *Ex Parte* No. 73 (R. 342 a), prescribed under said Act, to govern the delivery or relinquishment of possession of freight at destination without prior payment of such charges and thereafter lawfully recover from the shipper the freight charges for which credit was extended.

Judgment entered on the verdict of a jury in favor of petitioner, the shipper, on this issue was reversed by the Supreme Court of Pennsylvania, with instructions to enter judgment for respondent in the sum of $9,569.60, with interest (R. 356).

The pertinent portion of the Interstate Commerce Act and a summary of Order *Ex Parte* No. 73 are as follows:

Interstate Commerce Act, Sec. 3, par. (2), entitled, "Payment of freight as prerequisite to delivery", provides:

> "No carrier by railroad * * * shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination. * * *"

Order *Ex Parte* No. 73, prescribed by the Interstate Commerce Commission pursuant to Sec. 3, par. (2) above quoted, provides that— The carrier, upon taking precau-

tions deemed by it to be sufficient to assure payment of the tariff charges within the credit periods herein specified, may relinquish possession of freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges for a period of 48 hours, and that where retention or possession of freight by the carrier until the charges thereon are paid will retard prompt delivery or prompt release of equipment or facilities, the carrier, taking like precautions may relinquish possession of freight in advance of such payment and may extend credit in the amount of such charges for a period of 96 hours. (See Appendix to accompanying Brief or R. 342 a.)

B. Summary Statement of the Matter Involved.

In the month of October, 1932 petitioner, designated as shipper therein, executed thirty bills of lading issued by the Texas-Mexican Railway Company at Laredo and other points of origin, in the state of Texas, for the transportation by railroad over its road and roads of other carriers on the route to destination of 30 tank cars of crude petroleum consigned to Simrall Refining Corporation at Amherstburg, Ontario, Canada (R. 25 a-30 a). Each tank car was received enroute by respondent at Joliet, Illinois, for transportation thence to destination (R. 27 a).

Each tank car was delivered by respondent to consignee at destination without prior payment of the accrued freight charges and upon credit for said freight charges in an amount and a manner contrary to Order *Ex Parte* No. 73 (R. 305 a, 306 a, 307 a). The consignee thereafter failed to make payment and respondent, having neglected to ultimately collect such freight charges, brought suit therefor (assumpsit) against petitioner in the Court of Common Pleas of Venango County, Pennsylvania (R. 19 a).

By affidavit of defense (R. 64 a) petitioner denied that the tank cars were transported and delivered in accordance with the contracts of shipment and the law and regulation of said Interstate Commerce Commission governing the delivery of freight at destination. Petitioner further alleged that, contrary to the terms of said contracts for the transportation of said cars and in violation of law, the delivery of said cars was made and the possession thereof relinquished to the consignee without the payment of the rates and charges accrued and upon unlawful extensions of credit to the consignee, without knowledge or consent of petition. That undue or unreasonable preference or advantage was given to the consignee in breach and violation of each contract of shipment. That petitioner was not liable and that recovery against it could not be maintained (R. 64 a-77 a). This was in issue at trial.

At trial it was proven without contradiction that respondent relinquished possession of each car at destination without payment by consignee of the accrued freight charges and upon credit contrary to Order *Ex Parte* No. 73 and that the delivery made on the credit extended to consignee was on the basis of a stated sum of $15,000 for a period of seven days or upwards not to exceed two weeks, depending upon the date upon which the respondent relinquished possession of the freight, and was in the nature of a credit for arrivals during one week to extend through all of the next following week (R. 150 a, 153 a, 244 a, 246 a, 265 a). Order *Ex Parte* No. 73 was the only regulation in evidence governing and controlling the delivery of freight by a carrier in advance of the payment of the charges thereon (R. 307 a, 342 a).

The trial court affirmed petitioner's first request for charge that the contracts of shipment, containing no pro-

vision to the contrary, were contracts according to the laws of the United States and the rules of the Interstate Commerce Commission, and that if the jury find the tank cars were delivered to consignee at destination and possession of the carrier was relinquished without payment of the rates and charges and a credit extended to consignee not in accordance with Order *Ex Parte* No. 73 then the jury may find the contracts for the transportation of the tank cars were breached and may render verdict for defendant (now petitioner) (R. 322 a). The jury rendered verdict for petitioner (R. 324 a).

Upon judgment entered on the verdict (R. 344 a) respondent appealed to the Supreme Court of Pennsylvania. The petitioner in its brief in the Supreme Court of Pennsylvania, seeking to more clearly present such extension of credit in defense of the action as a question involved in the appeal, made a counter statement of the question for consideration by the Supreme Court of Pennsylvania, as follows:

> Defendant denied transportation and delivery of oil in accordance with contracts of shipment and proved without contradiction that delivery of oil to consignee on credit was not made according to contracts and was contrary to method of credit authorized by Interstate Commerce Commission *Ex Parte* Order No. 73 which was the only authority for credit in evidence. Might jury find from evidence that contracts were breached?

The Supreme Court of Pennsylvania in its opinion (R. 351; par. 3, R. 356) denied the right specially set up and claimed by the petitioner under the "Interstate Commerce Act," 49 U. S. C. A., Sec. 3, Par. (2), and under the promulgation (Order *Ex Parte* No. 73) of the Interstate Com-

merce Commission made pursuant to the direction of Congress in relation to the "payment of freight as prerequisite to delivery." It held that petitioner was liable under the provisions of Section 7 (R. 29 a) of the shipping contract because petitioner, as shipper thereunder, had failed to sign the statement which it might have signed directing that the carrier shall not make delivery without payment of freight and all other lawful charges (R. 28 a) and by so holding denied and rejected the right set up and claimed and drawn into question by petitioner upon the section of the Interstate Commerce Act mentioned and Order *Ex Parte* No. 73, in disregard of the uncontradicted proofs and finding of the jury that respondent had made delivery of the tank cars to consignee at destination upon credit contrary to the bills of lading and in violation of the law and applicable order of the Interstate Commerce Commission controlling such delivery.

C. Reasons Relied on for the Allowance of the Writ.

1. The question presented is a Federal question of substance and public importance and in so far as counsel is advised has not been determined by this court or any other court and the decision now sought to be reviewed seems to be not in accord with the law as enacted by Congress and the applicable decisions of this court declaring the law as to railroad carriers and bills of lading issued for the transportation of freight by railroad.

2. Denial and rejection by the Supreme Court of Pennsylvania of the right specifically set up and claimed by petitioner under the Interstate Commerce Act, U. S. C. A. Title 49, Sec. 3, par. (2), (a statute of the United States) and under the order of the Interstate Commerce Commission, Order *Ex Parte* No. 73, in force and promulgated pur-

suant to the direction of Congress in said statute, and refusal of said Court to apply the law thus prescribed relating to the payment of freight as prerequisite to delivery in a case calling for its application, in contravention of the right of petitioner and of public policy and general welfare.

3. The Supreme Court of Pennsylvania by its rejection of, and refusal to make application of, an applicable statute of the United States (*supra*) and Order of the Interstate Commerce Commission (*supra*) has decided an important question of general law governing carriers by railroad in conflict with said statute and Order.

4. The decision of the Supreme Court of Pennsylvania denies and rejects the effect upon, and application to, the issue at bar of a statute of the United States *(supra)* and an Order of the Interstate Commerce Commission promulgated thereon (*supra*) and is such a departure from the accepted and usual course of judicial proceedings as to call for the exercise by this Court of its power of review.

5. The decision of the Supreme Court of Pennsylvania approves and confirms the uncontradicted and deliberate violation by a railroad carrier of the mandate of a statute of the United States (*supra*) and Order of the Interstate Commerce Commission promulgated thereon (*supra*) and that decision should be reviewed and the law be thereby determined in relation to carriers by railroad.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this honorable court directed to the Supreme Court of Pennsylvania to review the final judgment or decree rendered and passed

by the Supreme Court of Pennsylvania in this cause entitled, The New York Central Railroad Company, a corporation, Lessee of Michigan Central Railroad vs. James B. Berry Sons' Company, Inc., No. 55 March Term, 1940, on appeal from the judgment of the Court of Common Pleas of Venango County, Pennsylvania, at No. 96 November Term, 1935.

JAMES B. BERRY SONS' COMPANY, INC.
By JOHN L. NESBIT,
J. VILLARD FRAMPTON,
J. H. COURTNEY,
Counsel for Petitioner.